

**This Opinion is Not a
Precedent of the TTAB**

Mailed: October 16, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Joy Industrial Co., Ltd.

Serial No. 85677182

Morton J. Rosenberg of Rosenberg, Klein & Lee for Joy Industrial Co. Ltd.

Tejbir Singh, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

Before Quinn, Wellington, and Hightower,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Joy Industrial Co., Ltd. (“Applicant”) seeks registration on the Principal Register
of the mark:



for the following goods:

Bicycle and bicycle parts and accessories, namely, bicycle frame, folding bike, bicycle fork, bicycle seat post, bicycle stem, bicycle rear shock, bicycle rim, bicycle saddle, bicycle saddle cushion, bicycle wheel, bicycle hub, bicycle crank, pump, mudguard, bicycle carrier; electric scooters,

electric bicycles, electric assisting bicycles; motorcycle parts and accessories, namely, motorcycle brakes, motorcycle wheel, motorcycle hub, motorcycle shock absorbers, motorcycle clutch brake lever, motorcycle rim locking nuts in International Class 12.¹

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the registered, standard-character mark **NOVATECK** for "tires, pneumatic, semi-pneumatic and solid tires for vehicle wheels, wheels for vehicles, inner tubes, wheel rims, and structural parts for all the aforesaid goods" in International Class 12.²

Applicant has appealed and appeal briefs have been filed. We affirm the likelihood of confusion refusal for the following reasons.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

¹ Application Serial No. 85677182 was filed on July 14, 2012, based upon an allegation of first use in commerce on May 10, 2011.

² Registration No. 3498126 issued July 28, 2009.

*The Goods, Their Trade Channels,
Classes of Consumers and Level of Purchasing Care*

We turn first to the *du Pont* factor involving the relatedness of the involved goods, as well as the factors involving the trade channels, relevant consumers and degree of purchasing care for these goods. It is settled that in making our determinations, we must look to the goods as they are identified in the application vis-à-vis those recited in the cited registration. *See Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). With this latter principle in mind, we are able to immediately discern that the respective goods are, in part, identical because Registrant's "wheels for vehicles ... wheel rims ... and structural parts for all the aforesaid goods" encompasses several of Applicant's bicycle and motorcycle-oriented goods, namely, "bicycle rims ... bicycle wheels ... bicycle hubs ... motorcycle wheels ... motorcycle hubs ... [and] motorcycle rim locking nuts."³

In cases where the identified goods are identical, we must assume that these same goods will travel in all of the same, normal channels of trade for such goods and will be offered to the same classes of purchasers. *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same

³ For purposes of determining the scope of Registrant's goods, we note that bicycles are by definition considered "vehicles." *See, e.g.*, "BICYCLE: a vehicle with two wheels tandem, handlebars for steering, a saddle seat, and pedals by which it is propelled." *Merriam-Webster.com*. Merriam-Webster, (www.merriam-webster.com/dictionary/bicycle). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

class of purchasers”). *See also, In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

In addition to our finding that certain goods are identical, the record further establishes that Registrant’s wheels and inner tubes are related to many of Applicant’s more bicycle-specific products. The Examining Attorney submitted website printouts showing several manufacturers of wheels and inner tubes also manufacture various bicycle parts, *e.g.*, handlebars, seat posts, forks, frames.⁴ Both the wheels and bicycle parts are offered for sale on online retail websites such as www.nashbar.com.⁵ The Examining Attorney also submitted printouts of many use-based, third-party registrations that cover both vehicle wheels and various bicycle-related products identified in the application.⁶ These registrations have probative value to the extent that they suggest that Registrant’s wheels and Applicant’s bicycle-related products are goods which may be marketed by a single source under a single mark. *See In re Association of the United States Army*, 85 USPQ2d 1264, 1270 (TTAB 2007); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

⁴ Attached to final Office Actions issued on May 29, 2013 and December 9, 2013; in particular, printouts from www.easton.com, www.specialized.com, and www.nashbar.com.

⁵ *Id.*

⁶ *Id.*

In its brief, Applicant argues that the involved goods are “specialized goods and it is therefore believed that [an] elevated standard [of a ‘discriminating purchaser’] applies” to this situation.⁷ Applicant further asserts that “consumers would become familiar with the respective marks such that upon encountering those marks applied to products, they would be able to readily distinguish them, one from the other.”⁸ However, the record does not support these assertions and we cannot find that the involved goods, namely, bicycle wheels and various other bicycle-related products are of the type where we can infer a higher degree of purchasing care. To the contrary, as the Examining Attorney pointed out, the record shows that many of the identified goods are not expensive and, in general, bicycles and scooters are purchased by a broad spectrum of the population.

In sum, we find certain goods, as identified in the application and cited registration, are legally identical and thus may be offered to the same consumers in the same trade channels.⁹ Certain other goods identified in the application are related to Registrant’s goods and may be offered for sale on the same online retail websites featuring bicycle goods.

Accordingly, the du Pont factor involving the relatedness of the goods, especially in light of the finding that the goods are legally identical in part, weighs heavily in favor of finding a likelihood of confusion. The factors regarding trade channels and classes of consumers also support a determination that there is a likelihood of

⁷ Brief at p. 12.

⁸ *Id.*


⁹ We note that Applicant readily acknowledges in its brief that “certain goods of Applicant and [Registrant] may be sold in the same or similar channels of trade.” Brief at p. 10.

confusion. We make no finding that the relevant consumers will exercise a higher or lower than normal degree of care in making their purchasing decisions of the involved goods and this factor thus remains neutral.

Similarity of the Marks

In comparing the marks, we must consider them in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We also keep in mind that the test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison; “[i]nstead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely.” *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992); see also, *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). That is, the proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Viewing the marks in their entireties, we find them to be very similar because not only is the near equivalent of the registered mark, **NOVATECK**, found in

Applicant's mark, , it is the dominant element therein. The literal portion of Applicant's mark, "N Novatec," is the element most likely to be impressed in a purchaser's memory. This term is more easily verbalized than any design element and thus is likely to be used by consumers in recalling, or referring to, the goods by their name. *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 2001); *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

Applicant relies on additional elements in its mark arguing that they are so different that consumers may easily distinguish the marks. We disagree. The additional design and color features in Applicant's mark are not so substantial to avoid a likelihood of confusion. In particular, the red underline and banner design are more in the nature of aesthetic features that add very little else to creating a unique commercial impression. Similarly, the lettering stylization employed in Applicant's mark is neither unusual nor impressive; indeed, because the registered mark is registered in standard characters, we must consider that it too may be presented in that same stylization or font. *See Viterra*, 101 USPQ2d at 1909. *See also Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847-48 (Fed. Cir. 2000). The letter "N" appearing at the top of Applicant's mark will likely be perceived as an abbreviation or reinforcement of the full term, NOVATEC, in

which case it would not create a separate or unique commercial impression. Even if consumers view the letter “N” as being arbitrarily placed in Applicant’s mark, a single letter or abbreviation is more difficult to remember than a complete term or word than may be verbalized or spoken. *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841 (Fed. Cir. 1990).

As a result, the involved marks’ commercial impressions and connotations derive entirely, or nearly so, from the terms, “Novateck” and “Novatec.” Although neither term has a defined meaning, each may be interpreted in the same manner to the extent that consumers would understand “nova” to mean “new” and “tec” or “teck” to be an abbreviation “technology.” In which case, both marks will be understood as suggestive of the Applicant’s and Registrant’s wheels and bicycle components possessing some innovative technology.

In sum, due to Applicant’s incorporation of the near equivalent of Registrant’s mark, there is a strong overall similarity between the marks. The additional elements in Applicant’s mark, not found in the registered mark, are insubstantial for purposes of obviating this similarity and distinguishing the marks. Thus, this *du Pont* factor weighs in favor of finding a likelihood of confusion.

Other factors

The Board has considered the entire record and all arguments set forth by Applicant and the Examining Attorney. Unless mentioned in this decision, we find all *du Pont* factors remain neutral in our likelihood of confusion analysis. In particular, we note that Applicant has argued that it “brought to the Examining

Attorney's attention numerous examples of other marks registered on the Principal Register for goods in International Class 12, which share common prefix and suffix word portions, namely, 'nova' and 'tech' and derivations thereof."¹⁰ As previously noted, Applicant also asserts that consumers would "become familiar with the respective marks ... [and] would be able to readily distinguish them, one from the other."¹¹ However, there is no evidence of record showing third parties have been using similar marks on or in connection with the same or similar goods.¹² Thus, to the extent that Applicant is arguing that consumers have become conditioned to viewing similar marks in use on the same or similar goods and may perceive some otherwise slight differences in the marks for purposes of distinguishing them, this has not been established.

Conclusion

Because the marks are very similar, the goods are in-part identical and otherwise related, and, with respect to the identical goods, we presume the classes of purchasers and trade channels to be the same, we find that Applicant's mark is likely to cause confusion with the cited, registered mark.

Decision: The refusal to register Applicant's mark is affirmed.

¹⁰ Brief at p. 2.

¹¹ *Id.* at p. 12.

¹² In the prosecution of the application, Applicant submitted copies of five (5) registrations of marks that begin with the term NOVA, but notably did not also contain the term TECH, or any derivative thereof. See Response filed May 7, 2013. Third-party registrations are not evidence that the marks are in use in commerce or that consumers have even been exposed to them. See TBMP Section 1208.02 (2014) and authorities cited therein; *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office).